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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1091

JERROLD K. COOK, *Petitioner*,

v.

REPUBLIC STEEL CORPORATION, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether both the District Court and the Circuit Court erred by failing to announce, for the first time, the existence of two new causes of action under New York law, in tort, permitting an employee to recover damages from an employer or former employer on account of the following activity on the part of the employer:

(a) failing to adopt a standardized job classification system which adequately describes every position in his organization;

(b) classifying an employee under an official job description which is different than that which is used to describe the position in letters of reference to prospective employers.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case is incomplete in some respects and in other respects it is wholly inaccurate. To make it even worse, it depends to a large extent upon material which is not a part of the Record below. Because of these serious shortcomings, Petitioner's Statement is not capable of giving this Court any accurate idea of what this litigation was really all about. Rather than spend its time in attempting to correct Petitioner's lopsided presentation, it would seem to be more sensible for Respondent to present here, instead, a complete and accurate Statement of the Case as it actually exists in the Record.

(A) *Petitioner's Background Prior to His Employment at Republic.*

Petitioner graduated from Harvard College in 1938 with a Bachelor of Science degree in Economics. Following graduation from college he worked for a year at the Calvert Street Bank in Baltimore City. In 1939, he left the bank and returned to Harvard where he secured 17 semester hour credits in Accounting Statistics at the Business College (App. 21, 54).* After a trip to Europe, he became employed at the State Street Trust Company in Boston as a messenger and check teller at a salary of $15.75 per week. He remained there for about 13 months and then joined the Fore River Shipyard of Bethlehem Steel in Quincy, Massachusetts, as a material requisition clerk at a salary of $26.00 per week (App. 54, 70). In 1941, he entered the Navy, and in 1946 he was discharged with the rank of Lieutenant Commander (App. 55).

In 1947, about a year after his discharge from the Navy, he secured a job as a management trainee, at a salary of

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* Figures in parentheses (App. . . .) are references to Appellee's Appendix below; (A. . . .) are to Appellant's Appendix below.

$55.00 per week, at the Container Corporation of America, which lasted for 3 months. At that time he became interested in the motion picture and television industry and started his own production company called the Douglas Jerrold Company. The business was not successful, and after a year Petitioner became employed with United States Steel in Pittsburgh, to work in cost accounting, at a salary of $270.00 per month (App. 57, 70). He stayed there a month and shortly thereafter, in 1948, he returned to Boston and worked in an insurance office at a salary of $55.00 a week. While there Petitioner became interested in foreign trade, enrolled in the Latin American Institute of New York, and started to write a book about the Marshall Plan (App. 57, 70). After two months at the insurance office, he went to Baltimore and joined the Cooper McDonald Company, "as sort as a partner", without salary, and within two or three months he left and started the Cook International Company, an export-import house in Baltimore (App. 59). He stayed in business for two years, and because he wasn't doing well, in 1951 he began to look for other employment (App. 59).

(B) *Petitioner's Employment at Republic*

Petitioner attempted to secure new employment by the means of a letter campaign. He sent out about 350 letters to presidents of major corporations in the United States, including one to Mr. Charles White, President of Republic (App. 21). Only Republic, through its Export Manager, David Bellamore, responded with a job offer (App. 21, 59, 132). Mr. Bellamore and Petitioner met in New York, and, after reviewing Petitioner's qualifications, Bellamore hired him to work in the exporting department. Specifically, his job was to take charge of the statistical work covering the

movement of Republic's export commodities, and to do market analyses to determine the possibilities for foreign markets for the sale of steel (App. 127, 132). Petitioner testified that Bellamore told him that he was to work as a "foreign market analyst" (A. 12), at a starting salary of $342.00 per month (App. 60). Republic had no established policy concerning job titles, but its records indicate that Petitioner was officially rated for its purposes as "Clerk — Sales Promotion" (A. 27, App. 116). The term "Clerk" was used at Republic as an all inclusive term to describe numerous categories of jobs in the sales department, including heads of departments, who were designated as "Chief Clerk" (App. 117-119, 121-122; A. 28).

Petitioner began to work at Republic on March 1, 1952, and remained there until December 9, 1953 (A. 12, App. 38). During the time that Petitioner was employed at Republic, he performed his work to the satisfaction of his superiors (App. 123, 128, 133). He worked directly under E. K. Clark, the Advertising Sales Promotion Manager of the Export Department (App. 22), and, in the course of his work, had occasion to prepare numerous reports, including comprehensive marketing surveys on Spain, Latin America, Mexico and Canada (A. 13, App. 23, 24), reports on competitors' foreign distribution centers, reports on the sales performance of other products abroad, as well as on some other miscellaneous subjects (App. 25-27, 28-31). He also prepared, on his own initiative, a report suggesting the establishment of a separate Market Research Division at Republic, to come directly under the Sales Manager rather than under the Advertising or Sales Promotion Manager. Petitioner anticipated that he would be the man to head up that new Department as Marketing Research Manager (App. 27-28, 61, 66-67). Most of the enumerated reports were complied solely by Petitioner, with

some help, however, from an assistant in the preparation of the charts and statistics (App. 27). Petitioner did 85% of his own typing while working at Republic (App. 66).

In November of 1953 Petitioner attended conferences at the American Iron and Steel Institute, as one of Republic's representatives, for the purpose of preparing a report for the President's Commission on Economic Policy. The report was to present a complete picture on the international trade situation in steel. Republic was to work on the portion relating to tariffs, and Petitioner was selected to do that job for Republic (App. 32-33). The report on tariffs which the Iron and Steel Institute proposed to submit disagreed with Petitioner's studies on the subject. Petitioner informed Mr. Bellamore of this fact, and prepared a report on the tariff situation in which he was critical of this country's policies with respect thereto. Mr. Bellamore ordered that his report not be made public (App. 34-37).

Two or three days after the foregoing conversations with Mr. Bellamore, on or about December 9, 1953, Petitioner met again with Mr. Bellamore, and this time tendered his resignation. Petitioner testified that his principal reason for resigning was his dissatisfaction with this country's price fixing policies in the export field (App. 37). However, in his discussion with Mr. Bellamore, he presented different grounds in support of his desire to leave Republic. He told Mr. Bellamore that he was fed up with making reports on subjects upon which other reports had already been made and he was tired of having his reports go unread. In addition, he stated that he desired to go into his own business (App. 37-38, 63, 133-134). Mr. Bellamore attempted to persuade Petitioner not to resign, but to no avail (App. 134). Petitioner's salary at the time he left Republic was $442.00 per month (App. 60).

Subsequent to leaving, Petitioner made some kind of a report or affidavit concerning Republic's, activities to the United States Department of Justice (App. 37). No one at Republic was ever told of this or ever learned of it until long after the institution of the present suit in 1957 (App. 67, 124, 129, 135). There is no evidence that this report or affidavit ever had any effect on Republic's classification or appraisal of Petitioner, or ever led to anything detrimental to Republic.

(C) *Petitioner's Activities and Efforts to Obtain Employment After Leaving Republic*

Following his resignation from Republic, Petitioner opened up a steel export commission house in New York called the Cook Steel Company, which, because of lack of success, was closed in October of 1954 (App. 38). Following this he began to look for employment, utilizing the same kind of "broadcast" letter campaign that he had employed prior to being hired at Republic. From 1954 to the time of trial he had employed 10 or 12 campaigns, sending out in all two or three thousand letters. He also advertised in the newspapers (App. 39-40). He sought employment first in the export field, but because the field was so small, he later broadened his efforts to secure work in the accounting profession. About 95% of his efforts were to secure a job as an Export Sales Manager or Assistant Export Sales Manager for a company in the export field (App. 40-41, 67-69). He always gave Republic as a reference because it had been his primary past employment (App. 40).

During the period while he was actively looking for work, he opened a small company called Marketing Services, a management consulting firm, and after it failed, he worked a short time for Fabricated Steel in Maryland as a

salesman. He left the latter firm because he did not approve of certain of their policies and because they did not consider him to be a good sales closer (App. 41-42). Besides these jobs, and a renewed effort to get into the motion picture business, Petitioner secured no other work after leaving Republic (App. 64).

(D) *Republic's References*

Republic has no centralized or coordinated personnel department, each department in the company having charge of its own personnel (App. 113). Any letters for recommendations are handled by the particular office in which the employee worked (App. 114). The staff of the Export Department, the department in which Petitioner worked, was never given any instructions concerning the manner in which Petitioner's references were to be handled, the employees in that department being left to use their own judgment (App. 124-125, 131, 135). The following are the references which were given by members of the Export Department concerning Petitioner:

(1) *New York State Department of Labor, Division of Placement and Unemployment Insurance — 1953*

Upon Petitioner's termination at Republic he was given a record of employment by the office manager, Mr. Kipp, for use at the New York State Department of Labor. It listed his occupation as a "commercial research analyst" (A. 20a, App. 38-39).

(2) *Argus Cameras, Inc. — 1955*

This reference, prepared by Mr. Clark, Petitioner's immediate supervisor, was in response to a written inquiry from Argus (App. 152). The reference reads in part as follows (App. 153):

"Mr. Cook's duties were concerned primarily with sales research covering the sale and potentials on steel and steel products manufactured by Republic and its various divisions. All of this work related to the overseas operation of the corporation under the general management of the Export Department.

"During his employment, Mr. Cook showed definite capabilities with respect to sales research, and turned in many assignments of marked merit. We feel that Mr. Cook has, as we mentioned above, real ability in this field, and should be able to turn in work of high caliber."

(3) *Diggins Detective Agency — 1956*

This inquiry was directed to Republic by Petitioner himself, through the Diggins Detective Agency (App. 43). The letter from Diggins to Republic states that Petitioner had listed Republic as a former employer, that he had listed as his occupation "market research analyst", and it asked a number of questions. The pertinent questions, and the answers thereto given by Mr. Clark, are as follows (A. 32):

"3. *Reason for Leaving:* Resigned, feeling scope of research not broad enough.

4. *What position held:* As above.

5. *Any criticism of the subject, in any respect:* He desired to build up too large a department than justified.

6. *Would you rehire:* No."

(4) *General Machinery Company — 1956*

The General Machinery Company was a psuedo company employed by Petitioner for the purpose of securing a reference on himself from Republic. He engaged a mail and telephone answering service run by one Thomas L. Smith in Washington, D. C. to assist him. Petitioner claims that he personally mailed a letter to Republic, signed by himself under the name of Ralph Scott, Personnel Officer

of General Machinery, in which he requested an employment reference on himself (App. 44-48). Republic denied ever having received the letter (App. 46-47, 48), but, over Republic's objection, the Court admitted what purported to be a carbon copy of that letter into evidence (A. 30, App. 48). Petitioner introduced into evidence, over Republic's continuing objections (App. 71-75), Smith's deposition, in which he testified as follows: In the spring of 1956 Petitioner called him and asked him to take a long distance call which was about to come in from a man whose name Smith could not recall. The man subsequently telephoned, stating that he was from Republic Steel and was replying to the letter of General Machinery for a recommendation on Petitioner (App. 138). Smith did not recognize the voice at the other end and did not remember the city from which the call was placed (App. 144). The man told Smith that Petitioner had been released or discharged from Republic because he had wanted to make a big department out of a little one and had "ideas of grandeur, or words to that effect" (App. 139, 144).

(5) *Charles P. Raymond Service, Inc. — 1957*

The Charles P. Raymond Service, Inc., a confidential employment service for textile, pulp and paper mills, wrote to Republic and informed them that Petitioner was seeking work with them in "Export sales, Prod. Assist. Dom. Sales Accounting" and asked for a report. Mr. Kipp, the office manager, replied for Mr. Clark, who was on vacation, and filled out the form as follows (App. 149-150):

> "*When and how long was he in your employ?* 3-1-52 through Dec. 54.
>
> "*As what?* Research.
>
> "*Was his work satisfactory?* Excellent.

* * * * * *

"Why did he leave? Research work completed.

"Would you re-employ him? No further need for research work.

"Did you find him honest? Yes. *Industrious?* Very.

* * * * * *

"Can you recommend him for position he is seeking? Should be good type work involved."

(6) *United States Civil Service Commission — 1957*

In 1957 Petitioner applied to the United States Civil Service Commission for a rating as an economist (GS11), stating in his application that he would accept no less than $6,390 per year in salary (A. 21). In his application he described his position with Republic as a "foreign marketing analyst" and described his work as "conducting market studies on many areas throughout the world" (A. 22). Republic's answer to the government's questionnaire was filled out by Mr. Conrad, Assistant Export Manager, and in response to a question seeking Petitioner's "official title or organizational position", his position was listed as "Clerk — Sales Promotion & Research". In response to other questions, Mr. Conrad stated that Petitioner had done economic research (market research) in overseas steel sales; that his work was done under general supervision, but that he was responsible for planning some portions; that he wrote the final reports, which were rarely revised; that his conclusions were generally sound and accurate; that his economic data had been secured from primary sources as well as trade journals and publications (A. 24).

With respect to Petitioner's knowledge, abilities and skills in economics, Mr. Conrad rated him as "very good" in every category, except in his ability to cooperate with co-workers and his ability to supervise and direct others, which was listed as "fair" (App. 146).

As a result of this application, Petitioner received a rating as an economist from the Civil Service Commission in the category of GS9 (App. 69).

(7) *William V. Rauscher Associates — 1958*

Mr. Rauscher, a friend of Petitioner's, wrote a letter to Republic inquiring as to Petitioner's employment at Republic, not for the purposes of employing him, but again to check on Republic's references. Mr. Kipp wrote back as follows (App. 151):

> "A review of our employment records indicates that Mr. Cook was employed by Republic Steel Corporation on March 1, 1952 as a statistician. His duties included the preparation of statistics concerning foreign markets in the steel industry. His reports on this subject were of excellent quality and he was considered to be an honest and industrious employee. Mr. Cook resigned from employment with Republic Steel Corporation on December 9, 1953."

(E) *The Evidence Concerning the Effect of Republic's References Upon Petitioner's Efforts to Secure Employment*

There is no evidence in the Record to the effect that any of Republic's references interfered with Petitioner's efforts to secure employment. Petitioner himself testified that no prospective employer ever told him that they had failed to hire him because of Republic's references (App. 69).

(F) *The Proceedings Below*

Petitioner filed suit in the United States District Court for the District of Maryland on September 24, 1957, his final amended complaint alleging in substance that, through the dissemination of false, incon-

sistant and damaging references, Republic had wrongfully interfered with his right to seek honest employment. After numerous changes of counsel by Petitioner, and at the end of a lengthy period of pretrial activity, the case came to trial on February 3, 1964. The trial lasted four days. All of the testimony outlined above was put into evidence as part of the Petitioner's case. In addition, Petitioner introduced the expert testimony of a market analyst, Philip Dolan, to the effect that the reports submitted by Petitioner during his employment were those of a "market analyst or a sales analyst, economic analysis, foreign economic research" (App. 102). Dolan admitted on cross-examination, however, that the work also fit under the description of a "statistical clerk" as given in the "Dictionary of Occupational Titles", and that Petitioner's work was basically in sales promotion (App. 105-106). The Court refused to permit a neighbor of Petitioner's, George M. C. Nelson, to testify as an expert concerning standard reference and termination procedures in large corporations of which he was acquainted (App. 106, et seq.).

At the end of Petitioner's case, Republic made a motion for a directed verdict (App. 17), which the District Court denied, stating "I will say this, it is on the thinnest grounds I deny it, I must say" (App. 76). At the conclusion of Republic's short case, the motion was renewed and again denied by the Court (App. 85). The jury returned a general verdict in favor of Republic (App. 100).

On appeal to Fourth Circuit, the judgment was affirmed in a per curiam opinion.

ARGUMENT

Although Petitioner alludes throughout his Brief to numerous alleged errors in the proceedings below, the real complaint that he brings to this Court relates to the District Court's charge to the jury.* His argument is difficult to follow, but he seems to claim that the charge was erroneous primarily because the District Court did not incorporate therein an instruction which would recognize, for the first time, two new causes of action under New York law. These new causes of action, said to be predicated on a theory of negligence, are for the following alleged wrongs: (a) an employer's failure to adopt a standardized job classification system which adequately describes every position in his organization and (b) an employer classifying an employee under an official job description which is different than that which is used to describe his position in letters of reference to prospective employers.

It seems evident from the nature of the question involved that this case is not the kind of case that this Court should review on certiorari. It fails to meet any of the criteria established by this Court for the review of lower federal court decisions, and, in addition, involves a cause which is patently not meritorious.

1. None of the Traditional Grounds for Granting the Writ are Present Here.

It was agreed between the parties hereto, both in the District Court and in the Circuit Court, that New York

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* In addition to his allegations concerning the District Court's charge, Petitioner makes various vague, generalized complaints about its rulings on the evidence and its failure to grant him a new trial. Because Petitioner himself, lays no great emphasis on these matters, and because it is so clear on its face that they could not be a basis for the granting of the writ, they will not be further referred to in this Brief.

law governed this litigation. Consequently, the District Court's instructions were based on the New York law that it found to be applicable to the case under the pleadings and the evidence. The pleadings indicated that two general theories of recovery were involved: (1) libel and (2) *prima facie* tort for wrongful interference with the right to secure employment. The New York law is quite clear on these subjects and, as can be seen from the charge itself, it was adequately presented to the jury in the District Court's instructions.

It was in the Circuit Court that the Petitioner claimed for the first time that the District Court had failed to recognize his two new theories of recovery. Even if it be assumed that he could have raised this question for the first time in the Circuit Court, and even assuming as fairly disputable his contention that justice required that his new torts be recognized, he has presented in his Petition no ground sufficient for this Court's intervention. Patently, the matter involves no question of federal law, important or unimportant. Moreover, there is involved no conflict between the lower court's action (or inaction) and the established New York law. To the contrary, it is the absence of any established favorable New York law that Petitioner would have liked to have had the lower courts change by the creation of two new causes of action. No conflict in the opinions of any of the Circuits has been shown, and certainly no departure by the lower courts here from the accepted and usual course of judicial proceedings has been established.

In short, no traditional ground for the granting of certiorari exists in this case, and, for that reason, it is submitted that the writ should not issue.

2. The Petitioner's Claim is Not Meritorious

An additional ground for refusing to grant the writ is the clear lack of merit in any of the Petitioner's claims.

As has been noted above, the heart of Petitioner's contention here appears to be the failure of the lower court to have included in its charge any instructions setting forth his two new theories of negligence. Assuming that the Maryland District Court would have had the right to add two brand new causes of action to the New York law, those suggested by Petitioner could not be the ones.

With respect to the first so-called tort (the failure to establish a standard job classification system) there has been suggested no logical basis upon which such a right of action could have been predicated. No duty exists on the part of any employer toward an employee to give him a uniformly recognized job classification, and we cannot conceive that any court would hold to the contrary. To establish such a duty would be to place a burden upon industry and commerce that would be extremely difficult to meet, and for very little good reason. There is no need for this kind of an obligation, and no fairness in the establishment of a wholly new cause of action based upon a breach of it.

There is also little need under the law for the second suggested new tort (the classification of an employee under an official job description different than that which is used in letters of reference). If the employer makes a material misstatement of facts concerning an employee in an employment reference, maliciously or as a result of gross or wanton negligence, the New York law provides a clear remedy in an action for libel or slander. See *Nichols v. Item Publishers, N.Y.*, 132 N.E. 2d 860 (1956). If the employer makes even a true statement concerning an employee in an effort to interfere with his securing employment, and does so

maliciously, a remedy exists in *prima facie* tort. *Al Raschid v. News Syndicate Co.*, N.Y., 191 N.E. 713 (1934); *Gersh v. Kaspar & Esh, Inc.*, 206 N.Y.S. 2d 510 (1960). Any improper activity on the part of an employer in connection with the giving of references for a former employee is thus already covered by the tort law of New York. The new separate causes suggested by Petitioner are obviously unnecessary, except, perhaps, to provide him with some ground for recovery now that all others available under the law of New York have failed him.

CONCLUSION

A glance at the outline of facts presented in this Brief's Statement of the Case will reveal that Republic has committed no wrong against Petitioner. Petitioner has had a full and fair trial before a jury in the District Court, and was accorded a fair hearing on appeal. Because he was without counsel in various stages of the proceedings below, he was given extraordinary consideration by both of the lower courts. He obviously has devoted a considerable amount of personal time already in pursuing what certainly must amount to a hopeless cause. It would be most unfair to him, let alone Republic, to allow this case to go any further.

For the foregoing reasons, it is submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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